Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket 02-55
	)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels	)	
	)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems	)	ET Docket No. 00-258
	)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service	)	RM-9498
	)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service	)	RM-10024
	)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service	)	ET Docket No. 95-18

SUPPLEMENTAL ORDER AND ORDER ON RECONSIDERATION

Adopted: December 22, 2004 **Released:** December 22, 2004

By the Commission: Commissioner Adelstein issuing a separate statement; Commissioner Copps concurring and issuing a separate statement.

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I. INTRODUCTION

1. On July 8, 2004, we adopted technical and procedural measures to address the ongoing and growing problem of interference to public safety communications in the 800 MHz band.[1] In the *800 MHz R&O*, we concluded that a Commission-derived plan comprised of both long-term and short-term components represented the most effective solution to the public safety interference problem in the 800 MHz band. We addressed the ongoing interference problem over the short-term by adopting technical

[1] *See* Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) as amended by *Erratum*, DA 04-3208, 19 FCC Rcd 19651 (2004) and *Erratum*, DA 04-3459, rel. Oct. 29, 2004 (*800 MHz R&O*).

standards defining unacceptable interference in the 800 MHz band, as well as procedures detailing responsibility for abating this interference and the steps parties must take to abate the interference.[2] The long-term component augmented the short-term component by reconfiguring the 800 MHz band to separate generally incompatible technologies whose current proximity to each other is the identified root cause of unacceptable interference.[3]

2. Subsequent to the release of the *800 MHz R&O*, parties made a series of *ex parte* presentations which provided additional information.[4] The Commission issued a *Public Notice* soliciting comment on certain presentations filed in this docket.[5] Based on this supplementary record and review of the *800 MHz R&O* by Commission staff, we believe it appropriate to make certain clarifications of, and changes to, the provisions of the *800 MHz R&O* and its accompanying rules.[6] We believe these changes will facilitate a more efficient and timely reconfiguration of the 800 MHz band.

3. In this *Order*, we clarify and revise portions of the *800 MHz R&O* to create an environment conducive to the efficient implementation of 800 MHz band reconfiguration. These clarifications and revisions include:

- Explicitly requiring Nextel to submit its 700 MHz Guard Band licenses to the Commission for

[2] *See 800 MHz R&O*, 19 FCC Rcd 15021-15045 ¶¶ 88-141 (adopting new standards for protecting public safety, critical infrastructure and other 800 MHz "high-site" licensees, from CMRS interference).

[3] *See 800 MHz R&O*, 19 FCC Rcd 15045-15079 ¶¶ 142-207 (adopting new 800 MHz band plan spectrally separating public safety and critical infrastructure users and other "high-site" licensees from Enhanced Specialized Mobile Radio (ESMR) systems using "low site" architecture).

[4] *See* Letter from Regina M. Keeney, Esq., Counsel to Nextel Communications, Inc. (Nextel), to Marlene H. Dortch, Secretary, Federal Communications Commission (FCC) (filed Aug. 30, 2004); Letter from R. Michael Senkowski, Esq., Counsel for Verizon Wireless, to Michael Powell, Chairman, FCC, dated Sep. 15, 2004; Letter from Regina M. Keeney, Esq., Counsel to Nextel to Marlene H. Dortch, Secretary, FCC (filed Sep. 16, 2004) (*Sep. 16th Nextel Ex Parte*); Letter from Regina M. Keeney, Esq., Counsel to Nextel to Marlene H. Dortch, Secretary, FCC (filed Sep. 21, 2004) (*Sep. 21 Nextel Ex Parte*) (providing revised figures regarding Nextel's spectrum contributions to the 800 MHz band reconfiguration among other things); Letter from Elizabeth R. Sachs, Esq., Counsel for Airpeak Communications LLC and Airtel Wireless Services, LLC, to Michael Powell, Chairman, FCC (filed Sep. 23, 2004) (*AIRPEAK/Airtel Ex Parte*); Letter from Regina M. Keeney, Esq., Counsel to Nextel to Marlene H. Dortch, Secretary, FCC (filed Sep. 23, 2004) (*Sep. 23 Nextel Ex Parte*) (discussing procedural and logistical issues regarding the letter of credit); Letter from Lawrence R. Krevor, Vice-President-Government Affairs, Nextel to Marlene H. Dortch, Secretary, FCC (filed Sep. 28, 2004) (*Interference Standard Ex Parte*) (proposing an interim interference standard); Letter from Regina M. Keeney, Esq., on behalf of Nextel to Marlene H. Dortch, Secretary, FCC (filed Oct. 1, 2004) (*Oct. 1 Nextel Ex Parte*); Letter from Robert M. Gurss, Esq., Director, Legal and Regulatory Affairs, Association of Public Safety Communications Officials International, Inc., (APCO) to Michael K. Powell, Chairman, FCC (filed Oct. 5, 2004) (*APCO Ex Parte*).

[5] *See* Commission Seeks Comment On Ex Parte Presentations And Extends Certain Deadlines Regarding The 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, *Public Notice*, FCC 04-253, (rel. Oct. 22, 2004). This *Order* addresses the critical issues, but not all issues, raised in the *ex parte* submissions, *supra* and comments thereon.

[6] As a general matter, the Commission may, on its own motion, reconsider any action made or taken by it within thirty days from the date of Public Notice of such action. *See* 47 C.F.R. § 1.108. Here, the date of Public Notice was the November 22, 2004, publication of the *800 MHz R&O* in the Federal Register. *See* 69 FR 67823 (Nov. 22, 2004) (R&O)

cancellation.

- Modifying provisions relating to the letter of credit to provide that the letter of credit will serve as a security against default, and will not constitute the corpus of band reconfiguration funds absent a default. We also provide that up to ten financial institutions may issue the letter or letters of credit under certain conditions and provide that we will consider waiver of the conflict of interest provisions governing the Trustee.

- Clarifying the scope of the acknowledgment that Nextel must file with the Commission as part of its acceptance of the terms and provisions of the *800 MHz R&O*.

- Clarifying the entities from which Nextel must obtain a Letter of Cooperation, committing such entities to make changes necessary to implement 800 MHz band reconfiguration.

- Analyzing more recent and comprehensive data on the spectrum holdings of Nextel and revising, accordingly, the credit Nextel receives for spectrum it must surrender as part of the band reconfiguration process.

- Setting interim received power level thresholds that non-cellular systems must maintain in order to claim protection against unacceptable interference during band reconfiguration. These interim threshold levels will remain in effect until band reconfiguration in a particular 800 MHz National Public Safety Planning Advisory Committee (NPSPAC) region is complete at which time the threshold levels adopted in the *800 MHz R&O* go into effect.

- Setting out provisions for abating interference to public safety systems that do not meet the interim received power level thresholds during the period in which said interim received power level thresholds are in effect.

- Clarifying and amplifying certain actions falling within the *800 MHz R&O* requirement that parties conduct their relocation negotiations in good faith.

- Modifying the eighteen-month benchmark so that, by that time, Nextel shall have relocated all non-Nextel and non-SouthernLINC incumbents from the former General Category channels 1-120 in at least twenty NPSPAC regions, and shall have initiated relocation negotiations with all NPSPAC licensees in said regions.

- Clarifying that mobile-only systems operating on a secondary basis on former General Category Channels 1-120 may continue to operate on said channels on a secondary basis.

- Clarifying when public safety and Critical Infrastructure Industry (CII) licensees[7] gain exclusive

[7] *See 800 MHz R&O*, 19 FCC Rcd 14973 n.11. For purposes of this proceeding, we defined CII licensees as those entities, outside of the scope of the "public safety service" definition of 47 U.S.C. § 337(f), but which operate "public safety" radio services within the scope of Section 309(j)(2) of the Communications Act, as amended. 47 U.S.C. § 309(j)(2) defines "public safety radio services" as including private internal radio services used by State and local governments and non-government entities, and including emergency road services provided by not-for profit organizations, that: (i) are used to protect the safety of life, health, or property; and (ii) are not made commercially available to the public. Examples of CII licensees include 800 MHz systems that provide private internal radio services used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, volunteer fire departments, and not-for-profit organizations that offer emergency road services, such as the American Automobile Association.

access to channels vacated by "Enhanced Specialized Mobile Radio" (ESMR) licensees as a part of band reconfiguration.[8]

- Specifying that non-public safety and non-CII incumbents operating on Channels 231-260 may continue to operate on these channels.
- Clarifying that a Commission-certified coordinator must coordinate channels vacated by ESMR licensees and applied for after completion of band reconfiguration of a given NPSPAC region.
- Declining to impose a two percent limit on administrative costs associated with incumbent relocation.
- Elaborating on the duties and authority of the Transition Administrator.
- Clarifying which Economic Area (EA) licensees are eligible for relocation to channels above 817 MHz/ 862 MHz.
- Declining to afford relocating licensees their choice of channels, provided that they are relocated to comparable facilities.
- Declining to require that relocating licensees be assigned channels in any particular sequence, but leaving such determination to the Transition Administrator.
- Defining the parameters governing the voluntary relocation of CMRS licensees to the Guard Band.
- Clarifying the extent to which Nextel may be involved in the physical process of retuning incumbent systems.
- Prohibiting "high site" systems above 817 MHz/862 MHz.
- Clarify that relocation of EA licensees does not constitute issuance of "new" licenses.
- Clarifying that license modifications necessary to implement band reconfiguration do not implicate the Commission's "unjust enrichment" rule.
- Modifying the rules affecting the "freeze" on 800 MHz license modification applications during reconfiguration of a given NPSPAC region.
- Clarifying the applicability of Section 22.917 of the Rules to cellular systems causing interference to 900 MHz systems.

II. BACKGROUND

4. As discussed throughout this proceeding, the interference problem in the 800 MHz band is caused by a fundamentally incompatible mix of two types of communications systems: cellular-architecture multi-cell systems used by ESMR and cellular telephone licensees and high-site non-cellular

[8] *See* 47 C.F.R. § 90.7 for a definition of what constitutes an ESMR licensee.

systems used by public safety, private wireless, and some SMR licensees.[9] Public safety entities became aware of this problem in the late 1990s. In April 2000, the Commission convened a meeting of representatives from major stakeholders in the 800 MHz band to address the growing problem of interference to 800 MHz public safety systems. As an outcome of the meeting, the parties published the *Best Practices Guide*, which contained technical modifications and procedures to reduce interference.[10]

5. On November 21, 2001, Nextel filed a White Paper proposing reconfiguration of the 800 MHz band to abate the interference being caused to 800 MHz public safety systems.[11] One month later the National Association of Manufacturers (NAM) and Manufacturers Radio Frequency Advisory Committee (MRFAC), one of the Commission's certified frequency coordinators, made a joint filing wherein they advanced a band reconfiguration plan which they claimed could be implemented without the need to give Nextel the requested 2.1 GHz spectrum.[12] The Commission issued a *Notice of Proposed Rule Making (NPRM)* seeking comment on band reconfiguration, generally, on the Nextel and NAM/MRFAC proposals and on a variety of related issues affecting abatement of interference to 800 MHz public safety systems. In the *NPRM*, the Commission documented the increasing incidence of interference to 800 MHz band public safety systems from high density ESMR and cellular telephone systems and tentatively concluded that interference to public safety communications systems represented "a sufficiently serious problem that a solution must be found."[13]

6. The release of the *NPRM* resulted in a record of over 2200 filings (both formal comments and reply comments; and an extensive number of *ex parte* presentations) containing engineering, economic, legal and policy analyses. This record, and our own internal analyses, culminated in the *800 MHz R&O,* in which we achieved the four, express, paramount goals we had established:

- a solution that abates "unacceptable interference" caused by ESMR and cellular systems to 800 MHz public safety systems;
- a solution that is both equitable and imposes minimum disruption to the activities of all 800 MHz band users, including public safety, non-cellular SMR, and B/ILT systems;
- a solution that results in responsible spectrum management; and
- a solution that provides additional 800 MHz spectrum that can be quickly accessed by public

[9] *See 800 MHz R&O*, 19 FCC Rcd 14972-73 ¶ 2.

[10] *See* Avoiding Interference Between Public Safety Wireless Communications Systems and Commercial Wireless Communications Systems at 800 MHz, a Best Practices Guide, December 2000 (*Best Practices Guide*).

[11] *See generally* Promoting Public Safety Communications, Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio - Public Safety Interference and Allocate Additional Spectrum to Meet Critical Public Safety Needs, Nextel Communications, Inc, submitted by Robert S. Foosaner, Nextel Communications, Inc., to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (cover letter dated Nov. 12, 2001) (White Paper).

[12] *See* Letter, from Jerry Jasinowski, President NAM and Clyde Morrow, Sr., President, MRFAC, Inc. to Michael Powell, Chairman, Federal Communications Commission, dated Dec. 21, 2001 (NAM/MRFAC Proposal).

[13] *See* Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, *Notice of Proposed Rulemaking*, WT Docket No. 02-55, 17 FCC Rcd 4873, 4482 ¶ 16 (2002), as modified in *Erratum*, 17 FCC Rcd 7169 (PSPWD 2002) (*NPRM*).

safety agencies and rapidly integrated into their existing systems.[14]

7. Since release of the *800 MHz R&O*, we have received *ex parte* communications and comments responsive to a *Public Notice* issued on October 22, 2004.[15] Our review and analysis of this supplemental record, and our independent review of the *800 MHz R&O*, form the basis for the actions we take herein as we continue to advance our goals in this proceeding.

III. DISCUSSION

A. Nextel's 700 MHz Guard Band Spectrum

8. We reiterate our decision in the *800 MHz R&O* to accept Nextel's surrender of its current 700 MHz Guard Band spectrum rights in forty-two markets.[16] Although we believe it was implicit in the *800 MHz R&O* that Nextel, in relinquishing its Guard Band spectrum would submit the related licenses for cancellation,[17] we have been asked to clarify that this will be the case.[18] Accordingly, we are ordering Nextel to submit its 700 MHz Guard Band licenses for cancellation within thirty days of publication of this *Order* in the Federal Register.[19]

B. Nextel's Acknowledgement

9. Paragraph 87 of the *800 MHz R&O* requires Nextel to file an acknowledgment to ensure that "the public is protected against potential claims by Nextel relating to any 800 MHz reconfiguration costs that it chooses to incur."[20] Such an acknowledgement must provide, in relevant part, that Nextel shall acknowledge that "it has studied the law and the facts and has made its own estimate of the risks that implementation of the *Order* may be delayed by judicial review and the *Order* may, in fact, be declared invalid" and that "it has accepted the risk of delay and invalidity and that, therefore, it cannot recover its costs or any damages associated with implementation or non-implementation of the *Order* from the Commission or any government entity."[21] In response to an inquiry from Nextel,[22] we clarify that the

[14] *See 800 MHz R&O*, 19 FCC Rcd 14972-73 ¶ 2.

[15] *See* n. 5, *supra.*

[16] *See 800 MHz R&O,* 19 FCC Rcd 15080 ¶ 208-209. We correct a typographical error in the *800 MHz R&O* to the effect that Nextel would surrender 700 MHz guard band spectrum in forty markets. *See 800 MHz R&O*, 19 FCC Rcd 15009 ¶ 61, 15080 ¶ 208. Our licensing records reveal that Nextel holds 700 MHz Guard Band spectrum in forty-two markets.

[17] *See 800 MHz R&O*, 19 FCC Rcd 14977-78 ¶ 12, 15080, ¶¶ 208-209.

[18] *See* Letter, from Kathleen Wallman, to Marlene Dortch, Secretary, Federal Communications Commission, dated Sep 20, 2004.

[19] Nextel shall return all of its 700 MHz Guard Band licenses to the Commission by filing cancellation requests in the Universal Licensing System (ULS). As noted above, this spectrum will not be available for licensing until the Commission decides through a rulemaking proceeding how it should be licensed.

[20] *See 800 MHz R&O,* 19 FCC Rcd 15021 ¶ 87.

[21] *Id.*

[22] *Nextel Sep. 23 Ex Parte* at 2.

quoted paragraph specifically means that, in the event a court invalidates the *800 MHz R&O*, Nextel would be barred from bringing a civil action against the government to recover the costs it had incurred up to that point in implementing 800 MHz band reconfiguration, or otherwise seek redress from the government for any claimed injury arising from Nextel's actions taken in connection with the *800 MHz R&O*. It does not mean that, in such instance, that Nextel and the other affected parties, including, without limitation, the Commission, must continue to perform their respective obligations under the *800 MHz R&O*.

C. Letter of Credit

10. In this section, we modify the letter of credit provisions in the *800 MHz R&O* in three respects, as discussed more fully below. First, the letter of credit will serve as a security against default, and will not constitute the corpus of band reconfiguration funds absent a default. Second, we will allow up to ten financial institutions to issue the letter or letters of credit, provided one of such institutions is designated as the agent for all institutions. Third, we will consider waiver of the conflict of interest provisions governing the Trustee, so as to provide a procedural means for allowing the Trustee to have *de minimis* interests which, otherwise could be viewed as a conflict of interest. We make these changes in response to information provided by Nextel and derived from its discussions with entities which may issue the letters of credit, or serve as the Letter of Credit Trustee.[23] In making these changes, we perceive no conflict with our basic objective of ensuring that funds will be available to complete band reconfiguration even in the event of a change in Nextel's financial condition, including bankruptcy.[24]

1. Background

11. The *800 MHz R&O* requires Nextel to "provide an irrevocable letter of credit securing $2.5 billion."[25] It envisions that the letter of credit "will serve as the funding source for the costs involved in reconfiguring the 800 MHz systems for non-Nextel licensees and possibly as the source of any payment to the United States Treasury."[26] The *800 MHz R&O* also provides that "only one financial institution, acceptable to the Commission, issue the letter of credit."[27] It also states that the letter of credit "shall specify a [T]rustee, acceptable to the Commission, as the beneficiary, which [trustee] shall administer the funds from the letter of credit and receive the funds from the letter of credit in the event of a Nextel default.[28] Among other things, "the Trustee will draw upon the letter of credit those funds necessary to accomplish band reconfiguration."[29] The *800 MHz R&O* further provides that "Nextel and the Letter of Credit Trustee shall formalize the terms of their relationship with a written contract and/or trust deed, drafts of which shall be submitted for Commission final review and approval."[30] The appendix to the

[23] *See Nextel Sep. 23 Ex Parte.*

[24] *800 MHz R&O,* 19 FCC Rcd 14987 ¶ 30.

[25] *Id.* at 15067 ¶ 182, 15121-22 ¶ 325.

[26] *Id.*

[27] *Id.* at 15067 ¶ 182.

[28] *Id.* at 15068 ¶ 184.

[29] *Id. at* 15067-68 ¶ 183.

[30] *Id.*

800 MHz R&O contains "an outline of key terms [of the contract] envisaged by the Commission,"[31] including a representation and warranty by the Letter of Credit Trustee (Trustee) that it "meets the qualifications set forth in the *Report and Order* (*e.g.*, independence and absence of conflicts of interest.)"[32] The *800 MHz R&O* also specifies that "on the occasion of a material breach by Nextel of its obligations hereunder, as declared by the Commission, the [T]rustee shall be entitled to draw on the ... letter of credit as specified in such instrument."[33]

2. Structure of the Letter of Credit

a. Draws to Cover Costs Relating to Each Incumbent Relocation

12. Nextel expressed concern about the cost and administrative burden associated with the procedure set forth in the *800 MHz R&O* governing the use of the letter of credit to directly finance band reconfiguration.[34] Nextel asserts that a procedure that would allow it to "pay[] the 800 MHz relocation costs directly as they are incurred during the relocation process, with corresponding periodic reductions in the amount of the [letter of credit]" would be "less costly and burdensome" than the procedure set forth in the *800 MHz R&O*.[35] Nextel recommended that the Transition Administrator, in consultation with the Trustee and Nextel, develop procedures that would allow Nextel to pay the 800 MHz incumbent relocation costs directly.[36]

13. Specifically, Nextel believes that such procedures should include the following:

- Nextel's obligations to pay an incumbent's retuning costs would be triggered when Nextel receives a valid invoice for such costs consistent with the terms of the retuning agreement with the incumbent, or, if such costs or invoice are disputed, when the dispute is resolved by the Commission or the appropriate alternative dispute resolution process.
- Nextel should have a commercially reasonable period (*i.e.*, 30 days) after the obligation is triggered to satisfy a payment obligation.
- In the event Nextel fails to satisfy a payment obligation within the required period, the Transition Administrator should notify Nextel that, if it fails to satisfy the payment

[31] *Id.* at 15068 n.496.

[32] *Id,* Appendix E-Annex E, p. 245, bullet 2 & p. 247, bullet 2.

[33] *Id.* at 15068 ¶ 184, 15121-22 ¶ 325.

[34] *Id.* at 15073-74 ¶ 198. *See also Nextel Sep. 21 Ex Parte; Nextel Sep. 23 Ex Parte; Nextel Oct. 1 Ex Parte*; *Nextel Oct. 13 Ex Parte.*

[35] Nextel noted that the draw fees alone resulting from the frequent and recurring draws "would likely total in excess of $2.5 million." It also argued that "frequent and recurring draws on the [letter of credit] would increase the Trustee's duties, which likely would result in higher costs charged by the Trustee to compensate it for its increased time and expense." Finally, it stated that the approach contemplated in the *800 MHz R&O* "would likely result in licensees not being paid as quickly because, after Nextel and the licensee have agreed to the payment amount (or the payment amount has been determined pursuant to the dispute resolution mechanism), the Transition Administrator, the Trustee, and [the letter of credit] fronting banks would each need to coordinate and implement the draw requests before the incumbent licensee could be paid." *Nextel Oct. 13 Ex Parte* at 1.

[36] *Nextel Oct. 13 Ex Parte* at 1.

obligation within ten days of such notice, the letter of credit Trustee will draw on the letter of credit to pay the costs in question.[37]

14. The only commenting parties that addressed this issue oppose Nextel's proposed modifications.[38] They believe the modifications would provide Nextel a superior negotiating position when negotiating relocation agreements with incumbents.[39] Specifically, these parties argue that relegating the letter of credit to a stand-by source of funding permits Nextel to gain concessions from licensees by promising faster, direct payment lower than their true costs.[40]

15. As an initial matter, we disagree that Nextel's payment obligations should be triggered by receipt of an invoice for retuning work. The *800 MHz R&O* contemplates that incumbents will obtain an advance estimate of retuning costs and present that estimate to the Transition Administrator or Nextel. Upon approval of the estimate, funds would be disbursed and the work would commence. Thereafter, an invoice, and the required certifications, would be presented to the Transition Administrator and any upward or downward adjustments would be made.[41] The process apparently contemplated by Nextel would involve reimbursement of reconfiguration costs an incumbent already incurred. We emphasize here that incumbents should incur no costs for band reconfiguration, and that the sole responsibility for paying all band reconfiguration costs—including the cost of preparing the estimate, negotiating the retuning agreement, and resolving any disputes—lies with Nextel.

16. We agree that Nextel should have a commercially reasonable period to satisfy a payment obligation directly. However, given the importance of abating unacceptable interference to public safety systems, and the speed of modern banking and accounting technology, we believe that funds should be provided as soon as practicable, and in no event in more than thirty days. While we recognize that timing of payments may be a factor in relocation negotiations, we believe that incumbent licensees, especially when the Transition Administrator serves as an intermediary, are fully capable of incorporating the time value of money into their negotiation strategies.

17. Accordingly, if Nextel fails to honor a payment obligation within thirty days, the Transition Administrator will consider whether facts or circumstances exist such that it is reasonable for Nextel not to honor the obligation. If ten days after the thirty-day period has run (*i.e.* forty days following the initial payment obligation), the Transition Administrator determines that no good causes existed for Nextel to fail to honor the payment obligation, the Transition Administrator will notify the Letter of Credit Trustee of the amount that Nextel owes and that the Trustee must draw this amount from the letter of credit. The Trustee must draw this amount from the letter of credit within thirty days of this notification (seventy days from the initial payment obligation). We stress that we expect Nextel to honor its payment obligations in a timely fashion and do not anticipate frequent use of the procedures set forth in this paragraph.

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[37] *Id.* at 1-2.

[38] *See* Comments of the United Telecom Council, the National Rural Electric Cooperative Association and the American Water Works Association on the Public Notice, filed December 3, 2004 at 7-8.

[39] *Id.* at 7.

[40] *Id.*

[41] *See 800 MHz R&O,* 19 FCC Rcd 15074 ¶ 198.

18. We note that the Transition Administrator, after receiving Commission concurrence, may direct the Trustee to make periodic (*e.g.*, quarterly) reductions in the letter of credit to account for such direct payments that Nextel may make. The details of both the direct payment and the letter of credit reduction procedures should be set forth in the agreement among Nextel, the Transition Administrator, and the Trustee (a draft of which is found at Appendix E-Annex E of the *800 MHz R&O)*, the final version of which shall be submitted to the Commission for review and approval.[42] However in no event shall the value of the Letter of Credit fall below $850 million. We hereby delegate to the Wireless Telecommunications Bureau, in consultation with the Commission's Office of General Counsel, the authority to conduct such review and approval.

19. In sum, we anticipate that Nextel will, in fact, pay relocation costs directly and that—from the standpoint of securing funds for complete band reconfiguration—this payment procedure will be at least equivalent to having the Trustee draw the funds directly from the letter of credit. However, if Nextel fails to pay a legitimate relocation cost then the Trustee must draw from the letter of credit. We wish to emphasize that this payment process does not affect the thirty-six month deadline for completion of band reconfiguration—a fact that provides Nextel incentive to satisfy its financial obligations in a timely fashion. Finally, we reiterate our statement in the *800 MHz R&O,* that, regardless of the letter of credit provisions herein, Nextel is unconditionally liable for payment of the full cost of band reconfiguration and clearing of the 1.9 GHz spectrum, including BAS relocation.[43]

b. Multiple Letters of Credit

20. In an *ex parte* presentation, Nextel stated that, "due to the size of the [letter of credit], and based on its discussions with the prospective lenders, it would be difficult, if not impossible, for the LOC to be issued by a single financial institution as contemplated by the R&O."[44] Nextel suggested that "the Commission's objectives could be achieved by having one or more letters of credit totaling $2.5 billion issued by a number of financial institutions, with each institution separately responsible for a proportionate share of the $2.5 billion LOC amount."[45] Nextel subsequently clarified that "it anticipates that no more than ten financial institutions would be issuing such letters of credit."[46] Nextel also stated that "the [letter of credit] arrangements could be structured to provide for the designation of a single agent to act on behalf of each of the issuing financial institutions."[47] We believe that the changes requested by Nextel can be accommodated consistent with our concern that funds remain available for completion of 800 MHz band reconfiguration independent of the financial condition of Nextel. Accordingly, we will allow up to ten financial institutions to be parties to the credit agreement pursuant to which the letters of credit are issued, so long as: (a) each such institution meets the qualifications for the issuer of the letter of credit as specified in the *800 MHz R&O;* (b) the issuing institutions designate a single agent to act on their behalf; and c) that each such institution is responsible to the trustee.

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[42] *Id.* at 15068 ¶ 184.

[43] *Id.* at 14977-78 ¶¶ 12-13, 14987 ¶¶ 29-30, 15064-15065 ¶¶ 177-179.

[44] *Nextel Sep. 23 Ex Parte* at 1.

[45] *Id.*

[46] *Nextel Oct.1 Ex Parte* at 1.

[47] *Id.*

3. Appropriate Qualifications for the Letter of Credit Trustee

21. Nextel has recommended that "the Commission clarify that an entity will be deemed to be independent and free of impermissible conflicts of interest, and thus qualified to act as the [t]rustee,"[48] specified in the *800 MHz R&O,* subject to the following conditions:

- it is an entity that would be eligible under the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa, *et. seq.*, to act as an indenture trustee for the debt obligations of Nextel or its subsidiaries;
- the engagement of such an entity to act as Trustee would not constitute a "related party transaction" of Nextel of the type required to be disclosed pursuant to SEC Regulation SK, Item 404;
- the entity does not, directly or through its affiliates, hold for its or such affiliates' account, debt obligations of Nextel and its subsidiaries that total in the aggregate more than 1% of the total consolidated debt obligations of Nextel and its subsidiaries;
- the entity is not, directly or through its affiliates, an issuer of the [letter of credit] required under the *800 MHz R&O;* and
- the entity has a combined capital and surplus of at least $50 million.[49]

Subsequently, Nextel stated it would "support a process under which Nextel and the proposed Trustee would be required to disclose to the Commission any potential conflicts of interest, with the Commission then determining whether such potential conflicts are disqualifying under the [above recommended] criteria."[50]

22. We agree that an entity meeting the conditions described above could, depending on circumstances, satisfy the *800 MHz R&O's* requirement that the Trustee be independent and free from conflicts of interest.[51] We require, however, that Nextel and such a proposed Trustee fully disclose any apparent conflict of interest, whether now existing, or arising in the future. Said disclosure must be accompanied by a request for waiver documenting that the potential conflict of interest will not affect the Trustee's independence and that the Trustee will remain independent throughout the band reconfiguration process. We hereby delegate to the Chief of the Wireless Telecommunications Bureau, in consultation with the Commission's Office of General Counsel, the authority to dispose of such waiver request. Upon denial of said waiver, a substitute Trustee, satisfactory to the Commission, must be

[48] *Nextel Sept 23 Ex Parte* at 2.

[49] *Id.*

[50] *Nextel Oct. 13 Ex Parte* at 2.

[51] The text of the *800 MHz R&O* did not explain this requirement. As noted above, however, the appendix to the *800 MHz R&O* at Appendix E-Annex E, p. 245, bullet 2 & p. 247, bullet 2, contains an outline of key terms including a representation and warranty by the Trustee that it "meets the qualifications set forth in the *800 MHz R&O (e.g.,* independence and absence of conflicts of interest)." We note that the discussion here relates to the independence and absence of conflicts aspects of the trustee's qualifications. The conditions set forth above do not necessarily bear on whether the trustee is qualified in other respects.

nominated, by Nextel, in the shortest practical time.

4. Other Circumstances Under Which Letter of Credit Trustee Could Draw Funds

23. Nextel seeks clarification of the statement in the *800 MHz R&O* that "[o]n the occasion of a material breach by Nextel of its obligations hereunder, as declared by the Commission, [the] Trustee shall be entitled to draw on the letter of credit as specified in such instrument."[52] Nextel requests that the provision be "clarified" to state that "the Trustee will be empowered to draw on the [letter of credit] only in instances in which Nextel fails to pay required incumbent retuning costs . . . or in the event of a material breach of Nextel's financial obligations in carrying out 800 MHz band reconfiguration, *i.e.*, if Nextel (1) files for bankruptcy protection, or (2) fails to make a payment to the U.S. Treasury within 30 days of the issuance of the Public Notice as described in paragraph 330 of the [*Order*]."[53] Nextel also requests that it "have 30 days to cure any such apparent breach before the Trustee is empowered to draw on the [letter of credit]."[54] We decline to limit the definition of "material breach" in the manner which Nextel suggests.

5. Reversion of Letter of Credit Funds

24. In its *ex parte*, Nextel requests that the Commission confirm Nextel's understanding that it will be able to "terminate the [letter of credit], and receive any funds remaining in the [letter of credit] trust account, after band reconfiguration is complete and after the financial reconciliation process set forth in the *R&O* is complete (including any payments to the U.S. Treasury)."[55] Specifically, Nextel asks us to clarify that if Nextel fails to make any of the payment owed to the Treasury by the date specified in the *800 MHz R&O* and the corpus of the letter of credit trust(s) becomes forfeit to the United States Treasury, the amount of any such forfeiture shall not exceed the amount owed to the United States Treasury by Nextel and any remaining amounts after such forfeiture shall be paid to Nextel.[56]

25. We believe that the reversion of the Letter of Credit funds to Nextel, in the circumstances described was implicit in the *800 MHz R&O*. However, we hereby clarify that if Nextel fails to make any of the payment owed to the Treasury by the date specified in the *800 MHz R&O* and the corpus of the letter of credit trust(s) becomes forfeit to the United States Treasury, the amount of any such forfeiture shall consist of the corpus of the trust(s), less the "Overage." We define "Overage" as any portion of the corpus of the trust(s) that (a) remains after the 800 MHz relocation is complete, and (b) exceeds the aforementioned payments owed to the Treasury. Once any Overage has been determined, the letter(s) of credit may be terminated by Nextel, but only after the Treasury has received the forfeited funds referenced herein.

26. However, we also take this opportunity to make it clear that all of Nextel's obligations hereunder are not limited to the sums available from the Letter of Credit. For example, if the corpus of the Letter of Credit were somehow inadequate to fund payment of Nextel's obligations to the Treasury,

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[52] *Nextel Oct. 13 Ex Parte* at 2, *citing 800 MHz R&O*, 19 FCC Rcd 15068 ¶ 184.

[53] *Id.*

[54] *Id.*

[55] *Nextel Oct. 13 Ex Parte* at 2.

[56] *Id.*

Nextel would nonetheless remain liable for the full amount due to the Treasury. We also reiterate our decision in the *800 MHz R&O* that in the event that the requisite border area agreements are not reached within thirty-six months of the release date of the Public Notice announcing the start of reconfiguration of the first NPSPAC Region, Nextel shall elect to extend the life of the Letter of Credit or secure a separate Letter of Credit for a sum of money equal to that which would have been incurred had the Commission band plan been implemented along the borders without regard to international agreements.[57]

D. Letter of Cooperation from Affiliates

27. In the *800 MHz R&O*, we require Nextel to obtain commitments to cooperate in band reconfiguration from entities that are "connected in any way" to Nextel.[58] Our intent in requiring such a commitment was to foreclose the possibility that entities such as Nextel Partners, Inc., a subsidiary of Nextel could disclaim responsibility for retuning its systems to implement band reconfiguration.[59] However, the term "connected" may be overly expansive in this context and arguably could be construed to include, *e.g.*, independent companies with which Nextel has "roaming agreements" but no ownership interest or control.[60] We now clarify that we did not intend such an expansive definition but rather desired Nextel or its successors or assigns to provide the Commission with letters demonstrating commitments from its corporate partners, subsidiaries, or affiliates (including any 800 MHz system operators in which Nextel has an ownership interest).[61]

E. Calculation of Credit for 800 MHz Spectrum Relinquished by Nextel

28. The *800 MHz R&O* contains a detailed set of calculations, to be applied at the conclusion of band reconfiguration, to determine whether the combination of (1) costs incurred by Nextel during band reconfiguration, and (2) the value of 800 MHz spectrum surrendered by Nextel, are equal to the value of the 1.9 GHz spectrum rights that Nextel will receive. The order provides that if the combined credits and offsets are less than the value of the 1.9 GHz spectrum, Nextel will pay the difference in the form of a "true-up" payment to the United States Treasury.[62] Thereby, the public achieves the benefits of band reconfiguration without forfeiting a disproportionate amount of the value of the 1.9 GHz spectrum. In formulating these calculations, it was necessary for us to assess the amount of 800 MHz spectrum currently held by Nextel and the value thereof. In the *800 MHz R&O*, the Commission assigned a cumulative value of $1.607 billion to the General Category (GX), interleaved, and contiguous 800 MHz spectrum below 817/862 MHz being given up by Nextel.[63] While Nextel does not challenge the Commission's methodology, in *ex parte* filings submitted to the Commission, Nextel contends that the Commission underestimated the actual MHz-population coverage of Nextel's spectrum, and that the

[57] *See 800 MHz R&O,* 19 FCC Rcd 15064 n.471.

[58] *See 800 MHz R&O,* 19 FCC Rcd 15121-22 ¶ 325.

[59] See, e.g., *Aug. 19 Nextel Ex Parte* at 1; *Sep. 16 Nextel Ex Parte* at 1; *Sep. 23 Nextel Ex Parte* at 2.

[60] Roaming agreements are agreements between wireless carriers that allow one company's subscribers to use their phones on the other wireless carrier's network.

[61] *E.g.*, Nextel Partners and Nextel International.

[62] *See 800 MHz R&O,* 19 FCC Rcd 15118-209 ¶¶ 318-322.

[63] *Id.* at 15118-209 ¶¶ 318-322.

resulting $1.607 billion figure is therefore too low.[64]

29. In the *800 MHz R&O*, the Commission determined the MHz-pops value of 800 MHz spectrum based on the available information presented in the record on this issue, as well as information in its licensing database.[65] To determine the amount (in megahertz) of GX and interleaved spectrum to be credited to Nextel, the Commission reviewed Nextel's 800 MHz license holdings in eleven major markets, and derived an average bandwidth figure from this market sample.[66] The Commission then multiplied each bandwidth figure by 234 million in population, which was the population coverage figure for Nextel's spectrum provided in the Kane-Reece valuation report submitted by Verizon.[67] Although Nextel contended that its 800 MHz spectrum provided full nationwide population coverage, the Commission concluded that multiplying the average bandwidth figures by a nationwide population figure would yield an inflated MHz-pop calculation because this did not sufficiently account for the presence of non-Nextel incumbents on GX and interleaved spectrum. The Commission, therefore, used the lesser Kane-Reece population figure, which was the only other available figure in the record.

30. In an August 30, 2004 *ex parte* filing, Nextel contended that its GX and interleaved license holdings covered virtually the entire nationwide population, and that the Commission should therefore have used a nationwide population figure of approximately 286 million rather than 234 million in its calculation, without changing the bandwidth or any other variable in the valuation formula. Based on this approach, Nextel initially proposed that the $1.607 billion credit for 800 MHz spectrum be increased by $738 million to a total of $2.345 billion. In a subsequent *ex parte* filing dated September 21, 2004, however, Nextel lowered its proposed credit adjustment based on a far more granular market-by-market analysis of 800 MHz spectrum held by Nextel and its affiliate, Nextel Partners.[68]

31. In its analysis, Nextel individually surveyed its licensed 800 MHz spectrum holdings in each of 3,219 U.S. counties, plus incorporated cities not included in a county. For each market, Nextel then took the population of the market, based on 2000 Census data, and calculated the specific number of usable GX, interleaved SMR, interleaved Business and I/LT, and 800 MHz contiguous channels held by Nextel or by Nextel Partners that covered the market.[69] Using this data, Nextel derived a revised set of

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[64] *See generally Sep. 21st Nextel Ex Parte.*

[65] *See 800 MHz R&O,* 19 FCC Rcd 15115-21 ¶¶ 307-323.

[66] The megahertz amount derived for the GX band was 5.12 megahertz, and the megahertz amount for the interleaved bands was 3.76 megahertz. *See 800 MHz R&O,* 19 FCC Rcd 15119-20 ¶¶ 319, 322.

[67] The Commission multiplied the MHz-pop figure for the GX band (5.12 megahertz x 234 million pops) by $1.70, which was the baseline MHz-pop value derived for both 1.9 GHz and 800 MHz spectrum. For the interleaved spectrum, the Commission multiplied the MHz-pop figure (3.76 megahertz x 234 million pops) by $1.49, which was the discounted value used based on the interleaved nature of the band.

[68] *Sep. 21st Nextel Ex Parte* at 2-3.

[69] To determine the number of usable licensed channels in a market, Nextel assumed the presence of a hypothetical cell at the population center indicated by U.S Census data for that market, subject to Part 90 co-channel short-spacing rules and incumbent protection requirements. The operating parameters of that cell were assumed to be typical for an iDEN base station, i.e., (1) ground elevation using thirty meter resolution terrain data; (2) antenna height of sixty feet above ground; and (3) effective radiated power of fifty watts using an omni-directional antenna. If the 22 dBμV/M contour of the model cell fit within Nextel/Nextel Partners' existing footprint for the subject channel (i.e., the model cell's contour would not extend beyond the composite 22 dBμV/M footprint of Nextel/Nextel (continued....)

MHz-pops figures for each spectrum category, and then applied to the MHz-pop figures for each category the MHz-pops formulas that were used in the *800 MHz R&O* (*i.e.*, $1.70 per MHz-pop for contiguous and GX spectrum, $1.49 per MHz-pop for interleaved spectrum), yielding the results in the table below:

	MHz	POPs	Value MHz POP	Actual Value
NPSPAC Spectrum	6.00	285,620,445	$ 1.70	$2,913,328,539
Restricted Use	(0.5)	285,620,445	$ 1.70	($242,777,378)
Guard Band	(2.00)	247,051,622	$ 1.70	($839,975,515)
Nextel Upper Channel Gain	**3.50**			**1,831,000,000**
General Category	(4.51)	285,620,445	$ 1.70	($2,188,000,000)
SMR Interleaved	(2.96)	285,620,445	$ 1.49	($1,258,000,000)
B/ILT Interleaved	(1.04)	285,620,445	$ 1.49	($444,000,000)
Total Nextel Loss	**(5.01)**			**($2,059,000,000)**

Based on the above analysis, Nextel proposed that its credit for 800 MHz spectrum be increased by $452 million rather than the $738 million originally requested, for a total credit of $2.059 billion.

32. We have carefully reviewed the Nextel analysis and the comments that parties have filed in response to that analysis. We conclude that the data submitted by Nextel provides credible support for its contentions with respect to the amount and value of 800 MHz spectrum that it will relinquish under the terms of the *800 MHz R&O*. Significantly, Nextel does not challenge the basic valuation approach used in that order, but has provided more comprehensive and detailed data regarding its spectrum holdings for use under the Commission's approach. Nextel has based its calculations on an analysis of all markets, rather than a sampling of markets. Nextel has also provided more complete information on Nextel's interleaved spectrum holdings by including data on interleaved non-SMR (B/ILT) channels held by Nextel, which were not taken into account in our valuation in the *800 MHz R&O*. In addition, Nextel's bandwidth calculations more accurately reflect the variations in Nextel's spectrum holdings from one market to another, and do not count spectrum that is unavailable to Nextel because of the presence of non-Nextel incumbents.

33. We believe it is in the public interest to base our valuation on the granular data provided by Nextel, rather than on the less precise information available to us at the time of the *800 MHz R&O*. Indeed, we note that Nextel's revised analysis does not always work in its favor. For example, it results in a lower value for some spectrum categories (816-817/861-862 MHz contiguous spectrum, interleaved SMR channels) than Nextel was credited for in the *800 MHz R&O*, while the offsetting valuation of other

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Partners' EA licenses and individual site licenses), then the subject channel was deemed "usable" and counted towards Nextel's bandwidth figure for that market.

categories (GX channels, interleaved non-SMR channels) is higher.

34. We believe no commenting party has shown material errors in the Nextel analysis. For instance, we disagree with those parties who claim it is unclear how Nextel determined where particular channels are available and usable.[70] We believe Nextel clearly described the methodology they used to determine whether channels were usable based on compliance with all Part 90 co-channel short-spacing requirements.[71] Our incorporation of the granular Nextel data into the valuation methodology set out in the *800 MHz R&O* yielded results consistent with those derived by Nextel. In addition, we disagree with parties who claim that Nextel should have submitted their data before the Commission reached a decision on this matter.[72] Although Nextel's initial data on its spectrum holdings was not completely supported and documented, we observe that Nextel could not forecast the exact level of detail required because they were unaware of the valuation methodology the Commission would employ.

35. Nextel concedes that its analysis does not take border area channel restrictions into account. However, Nextel contends that even if this results in some overestimation of the amount of usable spectrum it is giving up in the border areas, this is offset by the fact that, in the border areas, Nextel will not receive the full six megahertz of spectrum currently assigned to the NPSPAC channels, even though it has been credited with this gain nationwide for purposes of the valuation analysis.[73] We agree that any overestimation of Nextel's border area spectrum is offset by the lesser amount of spectrum Nextel will receive in those areas, so that variations in border area coverage and bandwidth do not materially affect our valuation analysis.

36. Based on this revised information, we conclude that the "credit" that Nextel should receive for surrender of 800 MHz spectrum should be increased by $452 million.[74] Accordingly, in the post-rebanding calculation used to determine whether Nextel must make a "true-up" payment to the United States Treasury, Nextel will be credited the sum of $2.059 billion for its surrendered 800 MHz spectrum.

F. Interference Mitigation

1. Signal Strength Threshold for Interference Protection

37. In the *800 MHz R&O*, we specified that public safety, CII, and other non-cellular 800 MHz systems must receive at least a minimum measured input signal power of -101 dBm for portable (*i.e.*, hand-held) units and -104 dBm for vehicular (mobile) units in order to be eligible for protection from interference in the 806-816.35 MHz/851-861.35 MHz band segment.[75] We chose these values by balancing the reference sensitivity of 800 MHz receivers (typically on the order of -116 to -119 dBm) with the desire not to impose an excessive burden on ESMR and cellular telephone carriers to protect an

[70] Comments of Cingular Wireless LLC, filed December 2, 2004 at 5 (*Cingular Comments*).

[71] *See e.g., Sep. 21st Nextel Ex Parte* at 4.

[72] *Cingular Comments* at 5-6.

[73] For example, in Canadian Region 2, Nextel may receive as little as 1.79 megahertz of spectrum in the current NPSPAC band, far less than the six megahertz of such spectrum it will receive in other parts of the country upon completion of band reconfiguration. *Sep. 21st Nextel Ex Parte* at 4.

[74] *Sep. 21st Nextel Ex Parte* at 3.

[75] *See 800 MHz R&O*, 19 FCC Rcd 15029-30 ¶¶ 105-107.

extremely weak signal.[76] We imposed these signal strength threshold protection levels in the knowledge that such levels could be burdensome before band reconfiguration was completed, and that the Consensus Parties intended these levels to go into effect only after reconfiguration of the 800 MHz band.[77] However, we chose to implement them immediately because there was nothing in the record, at the time, that would have merited our imposing different interference protection thresholds until the completion of band reconfiguration. The alternative—no interference protection whatsoever until band reconfiguration was complete—was unacceptable given the threat to life and property posed by unacceptable interference to public safety communications.

38. Recently, we have been presented with data: (a) showing that the thresholds established in the *800 MHz R&O* could impose substantial operational restrictions on ESMR carriers operating in the interleaved channels prior to completion of band reconfiguration;[78] and (b) that field experience has shown that a lesser standard will provide less complete—but still meaningful—interference relief while band reconfiguration is being completed.[79] We therefore waive Sections 22.970(a) and 90.672(a) of our Rules[80] until band reconfiguration is complete in a particular NPSPAC region.[81] Once the Transition Administrator has certified reconfiguration is complete in a region or regions the Commission will release a *Public Notice* announcing that the interim interference protection thresholds permitted under this waiver no longer apply for operations in those regions. Should Nextel decide not to file the acceptance letter required in the *800 MHz R&O*, the -101/-104 dBm interference protection thresholds set forth in sections 20.970(a) and 90.672(a) of the Commission's rules will remain in force.[82]

39. Under the "interim standards" waiver, non-cellular systems meeting a -85 dBm (portable) or -88 dBm (mobile) signal strength threshold will enjoy the full protection measures adopted in the *800 MHz R&O*.[83] These interim levels, proposed by Nextel, are supported by several commercial, private and

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[76] *Id.* at 15029 ¶ 105.

[77] The Consensus Parties are proponents of a proposal whose essential elements underpinned significant aspects of the *800 MHz R&O*. *Id.* at 14974 n.13.

[78] *See Interference Standard Ex Parte* at 1-5, *APCO Ex Parte*; Comments of Shulman, Rogers, Grandal, Pordy & Ecker, P.A., at 3-4, filed Nov. 8, 2004 (*Shulman Rogers Comments*)..

[79] *See Interference Standard Ex Parte* at 5.

[80] 47 C.F.R. §§ 22.970(a), 90.672(a).

[81] We recognize the concern raised by the Arizona Public Service Company (Arizona) that "holdouts" in a particular NPSPAC region may hinder the completion of rebanding in a region, thus delaying the transition to the final interference protection plan. *See* Comments of Arizona Public Service Company, filed Nov. 24, 2004 (*Arizona Comments*) at 1. However, Arizona's solution—transition to full interference protection values should occur when reconfiguration in a particular NPSPAC region is "essentially complete"—places the Commission with the need to determine, on a case-by-case basis, what constitutes "substantially complete" in the context of each NPSPAC region. Moreover, we cannot envision a situation in which we would declare rebanding of a particular NPSPAC region "substantially complete" if an ESMR or major CMRS provider, which could be the major interfering party in a region, had not been reconfigured.

[82] *See 800 MHz R&O,* 19 FCC Rcd 15129 ¶ 344; 47 C.F.R. §§ 20.970(a), 90.672(a).

[83] *See 800 MHz R&O,* 19 FCC Rcd 15029-30 ¶ 105-107; *See Interference Standard Ex Parte* at 3-4. Licensees using Class A receivers must have a minimum on-street signal level of -85 dBm for portable units and -88 dBm for mobile units in the area experiencing interference. Interim interference protection for licensees using non-(continued....)

public safety members of the 800 MHz community.[84] However, support for these interim standards was not universal. Several parties opposed delaying the implementation of the full abatement standards until completion of band reconfiguration in a given NPSPAC region. The Public Safety Improvement Coalition (*PSIC*) argues that these interim standards contravene the Commission's decision to provide immediate relief to public safety systems experiencing unacceptable interference by requiring stations with weaker signal strength to accept interference for up to three years.[85] The Tri-state Radio Planning Committee (*Tri-State*) believes that the original standards protect the integrity of commercial networks while requiring public safety systems to accept protection levels below those necessary to achieve a minimum mean signal level (50% reliability).[86] Moreover, Tri-State argues that these interim standards should not apply to systems operating in the NPSPAC channels because these channels are not interleaved.[87] The Industrial Telecommunications Association, Inc., (*ITA)* argues that, because these interim standards only mandate the use of Best Practices for receivers that do not meet a set signal strength standard, our actions would represents a step backwards because licensees currently apply Best Practices solutions on a voluntary basis for all systems, regardless of technical parameters.[88]

40. As an initial matter, we note that the interim interference protection thresholds correspond approximately to the 50 dBμV/M minimum signal contour recommended by the Telecommunications Industries Association (TIA) TR-8 Subcommittee for public safety systems operating in urban environments where interference is more likely to occur than in "quieter" suburban or rural areas.[89] TIA asserts that a 50 dBμV/M or stronger signal field makes intermodulation interference less likely and facilitates building penetration.[90] Further, we have reviewed Nextel's comments on the effect the interim interference thresholds would have on certain randomly selected locations and on the Denver, Colorado, public safety system, wherein, Nextel claims, these threshold levels were met at thirty-nine of forty randomly selected locations at which interference was reported.[91] The Nextel information would have been more useful had Nextel provided the underlying data and the methodology used to reach that conclusion. For example, Nextel neither identified the "randomly selected" locations nor stated what

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Class A receivers will be adjusted based upon the receivers' performance specifications. For example, if a Class B receiver has an intermodulation rejection specification of 5 dB less than a Class A receiver, its protection threshold would be adjusted to -80 dBm. *Id.*

[84] Letter from Chris Guttman-McCabe, CTIA-the Wireless Association (CTIA) to Marlene H. Dortch, Secretary, FCC at 5 (filed Oct. 13, 2004) (*CTIA Ex Parte); APCO Ex Parte*; *Shulman Rogers Comments* at 3-4.

[85] *See* Comments of the Public Safety Improvement Coalition, filed Dec. 2, 2004 at 2-4 (*PSIC Comments) citing 800 MHz R&O*, 19 FCC Rcd 15028 ¶ 102.

[86] *See* Letter, dated Dec. 2, 2004, from Peter W. Meade, Chairman, [800 MHz NPSPAC] Region 8 to Marlene Dortch, Secretary, Federal Communications Commission at 1-2 (*Tri-State Radio Comments*).

[87] *Id.*

[88] *See* Comments of Industrial Telecommunications Association, Inc., at 7, filed Dec. 2, 2004 (*ITA Comments*).

[89] *See* Comments of the Telecommunications Industry Association, filed May 6, 2002 at 3-4. *See also* TIA 50 dBu Contour Recommendation, TR-8.18/02-08-00 19, (April 1, 2001).

[90] *Id.*

[91] *Interference Standard Ex Parte* at 5.

public safety systems were involved or whether their conclusions rested on a single point measurement or a group of measurements that were reduced to a mean, median or other statistical value. Accordingly, because of the lack of such information, we have been unable to replicate the Nextel analysis, and therefore can give little weight to the Nextel claim that interference would be mitigated "for between 86% and 92% of these locations . . ."[92] Similarly, Nextel has not provided the underlying data for its claim that the interim signal threshold would be exceeded at thirty-nine of the forty locations where interference to the Denver, Colorado public safety system has been reported.[93] Nextel has not provided data on whether its conclusions rest on a single data point measurement, or a mean, median or other statistical value applied to a group of measurements. If Nextel was relying on the Denver interference study conducted by Pericle Communications Company[94]—the only such study in the record—we observe that study included literally hundreds of data points and that Nextel did not identify the data points used. We also note the comments of Tri-State that we should not disturb the conclusion in the 800 MHz R&O that the -101 dBm / -104 dBm thresholds should go into effect immediately and that those levels would provide only 50% reliability.[95] It is unclear from the Tri-State filing whether Tri-State attributes the 50% reliability figure to the fact that the -101 dBm / -104 dBm levels are relatively weak and near the noise floor; or whether their point is that interference would reduce reliability to 50% when the received signal power is as low as -101 dBm / -104 dBm. In any event, Tri-State has not shown how it derived the 50% figure and we thus are not able to factor it into our analysis of Nextel's proposed interim threshold received signal power levels. We do note that APCO, an active participant in this proceeding from the outset, believes the interim levels are satisfactory.[96]

41. There is a direct relationship between the threshold levels chosen for interference protection and the ability of ESMR and cellular carriers adequately to serve their subscribers—a factor that affects both the public's access to wireless service and the viability of the carriers' business. We are not prepared to say that the -85 dBm / -88 dBm interim values strike an exact balance between these competing interests. However, they do appear within the range of reason. Accordingly, as noted in ¶ 38, *supra,* we are waiving the provisions of Sections 22.970(a) and 90.672(a) of our Rules until band reconfiguration is complete in a given NPSPAC region. We note that parties are free to contest our decision and persuade us that data show otherwise.[97] We observe, in that regard, that claims that the interim values are invalid would be given little weight unless accompanied by the data and methodology underlying those claims.

42. Moreover, we do not believe that the interim levels, alone, will provide sufficient interference protection for public safety communications. Therefore, we caution CMRS licensees that they must exercise the utmost diligence in addressing reports of interference even in cases in which the interim levels are not met. As noted in the *800 MHz R&O,* unacceptable interference can be addressed using Enhanced Best Practices and, when necessary, providing public safety licensees with such

[92] *Id* at 5.

[93] *Id.*

[94] *See, e.g., ex parte* comments, dated June 10, 2003, from City and County of Denver (Denver June 10 *Ex Parte*).

[95] *Tri-State Radio Comments* at 1.

[96] *See APCO Ex Parte.*

[97] *See* 47 C.F.R. § 1.106 (Petitions for Reconsideration).

additional equipment as may be necessary to address an interference problem.[98] We note that the interim threshold values correlate closely with the TIA recommendations, *supra;* and our independent review of received power levels contained in the record does not show that the interim values are inherently unreasonable. However, we are concerned that the interim values, even when supplemented by Enhanced Best Practices, may compromise some public safety systems. Both the CMRS operators and public safety officials should be vigilant that unacceptable interference does not occur on channels that are used for mission critical applications, *e.g.,* tactical channels, which may have to be shifted to another frequency to ensure adequate reliability. Thus, we accept the interim values with some reluctance, but recognize that they will apply only until band reconfiguration is completed in each NPSPAC region, and because no party has shown that the values chosen—in combination with Enhanced Best Practices—will result in widespread unacceptable interference. Moreover, we adopt, and incorporate into the waiver, *supra,* the following provisions patterned after Nextel's recommendation for protection of public safety systems that do not meet the interim threshold values, but do meet the threshold values contained in the rules.[99]

- CMRS carriers must mitigate unacceptable interference on public safety control channels (up to four channels) such that the public safety receiver maintains a minimum C/(I+N) of 17dB;

- CMRS carriers must exercise best efforts to mitigate CMRS/public safety interference on the public safety system's voice channels using interference mitigation measures such as those set out in the *Best Practices Guide* so that the public safety receiver maintains a minimum C/I+N of 17dB;[100] and

- If the CMRS carrier(s) are unable to mitigate interference to a public safety system's voice channels, CMRS carriers must provide a report to the public safety licensee demonstrating why mitigation is not practicable in the specific circumstance, even after application of Enhanced Best Practices, including modification or replacement of public safety equipment. After receipt of the report, if the public safety licensee determines that it expects serious system degradation, it may request the Transition Administrator to facilitate mandatory mediation between the parties to obtain relief. If such mediation is unsuccessful, the public safety licensee may seek relief from the Public Safety and Critical Industry Division of the Wireless Telecommunications Bureau. The public safety licensee must serve its request on all relevant CMRS carriers.

43. Although we continue to recognize the importance that CII systems play in the protection of life, health and property, as well as their growing role in Homeland Security, we decline to extend these additional protections to CII licensees because these licensees generally have greater access to funds sufficient to improve signal strength than public safety entities which operate on an appropriated funds basis.[101] We also decline to exempt NPSPAC licensees from these interim signal thresholds because

[98] *See 800 MHz R&O,* 19 FCC Rcd 14035 ¶ 118.

[99] *Interference Standard Ex Parte* at 3-4. We recognize that this would delay full interference protection for these licensees (*see PSIC Comments* at 2-4) but note that even during this interim period these licensees will enjoy a less interference prone environment. *See* para. 44 *infra.*

[100] *See Best Practices Guide passim.*

[101] *See e.g.,* Comments of Entergy Corporation and Entergy Services, Inc., at 5 filed Dec. 2, 2004 (*Entergy Comments*); Comments of Cinergy Services, Inc. and Consumers Energy Company, at 5-6 filed Dec. 2, 2004 (*Cinergy Comments*).

until the NPSPAC channels relocate to the lower portion of the 800 MHz band, their systems will still be subject to the possibility of intermodulation interference from ESMR and cellular carriers.

44. We disagree with those parties who argue that the interim interference mitigation thresholds would extend the interference problems in the 800 MHz band for years.[102] The initial phase of band reconfiguration, in which Nextel vacates its spectrum in the interleaved channels and moves General Category incumbents (excepting SouthernLINC) into that vacated spectrum will provide immediate, albeit limited, spectral separation between incompatible technologies, thus providing some decrease in the potential for interference.

45. Even as we set out these interim interference mitigation measures, we continue to afford ESMR and cellular carriers a certain degree of flexibility in resolving interference incidents. We note that the burden for resolving interference is shared not only among ESMR and cellular carriers but also with public safety and that all parties to an interference incident are under a good faith obligation to cooperate. Thus, public safety and CII licensees may make reasonable concessions in the interest of resolving interference if the interference does not compromise safety of life, health and property. Private wireless licensees, such as B/ILT and traditional high site SMR operators, may reach mutual agreements with ESMR and cellular carriers at variance with the foregoing interference provisions until such time as band reconfiguration is complete in a given NPSPAC region.

2. Interference Resolution Procedures

46. In the *800 MHz R&O*, we adopted procedural requirements to expedite the resolution of interference incidents.[103] Many of these requirements focused on the good-faith obligations of all the parties, including ESMR licensees and cellular operators, in resolving interference. For example, we require ESMR and cellular carriers to respond within twenty-four hours when a public safety licensee reports interference and to perform an interference analysis within forty-eight hours of receipt of such notification.[104] However, we recently have been asked to require licensees making these notifications to include the following system information with their notification:

- receiver make and model number,
- minimum measured input signal power, and
- verification that the affected receiver meets the minimum performance requirements identified in Sections 22.970(b) and 90.672 of the Commission's rules.[105]

47. This advance information is purportedly essential to enable cellular and ESMR licensees to begin an immediate assessment of the nature and scope of the interference and possible abatement efforts and actions.[106] We disagree. The only initial obligation of the interfered-with party pursuant to the *800*

[102] *See Cinergy Comments* at 5-8; *Entergy Comments* at 4; *ITA Comments* at 7.

[103] *See 800 MHz R&O,* 19 FCC Rcd 15041-45 ¶¶ 132-141.

[104] *Id.* at 15043 ¶ 136.

[105] *See* CTIA *Ex Parte* at 2. *See also* 47 C.F.R. §§ 22.970, 90.672.

[106] *See* CTIA *Ex Parte* at 2.

MHz R&O is to report, to a single source for receiving interference reports, the location of interference, the time it occurs, a description of kind and severity of interference, the source (if known), the licensee's licensing information and where it can be contacted.[107] It may not be burdensome for the interfered-with party to report the receiver(s)' make and model number. However, the measurement of received signal power and verification of performance characteristics are substantial efforts that may create an unacceptable burden on the affected public safety or other "high-site" licensee. Nothing we said in the *800 MHz R&O* can be construed to place the exclusive burden of measuring signal power or receiver performance on the party experiencing unacceptable interference. Indeed, particularly with respect to public safety licensees, the interfered-with party may lack the equipment necessary to make such measurements and the expertise to use it. Accordingly, we clarify here that it is the party or parties to which an interference report is addressed, that must conduct received power measurements or receiver performance measurements, when necessary to resolve an interference incident; and that the interfered-with party is required to cooperate with the involved CMRS licensee(s) in providing such other information and assistance as may be reasonably necessary to assist the CMRS licensee(s) in identifying and abating unacceptable interference. In sum, we will not burden interfered-with parties with information collection requirements as a prerequisite to abating interference to what oftentimes are mission critical communications.

48. However, in response to a request from CTIA, we will extend from thirty days to sixty days (after the effective date of the rules), the deadline established in Sections 22.972(a)(2) and 90.674(a)(2) for cellular and ESMR carriers to establish a common, unified electronic means for initial notification of interference incidents.[108] We believe this extension will allow the industry time to develop a single interface, as well as create standard processes and protocols for response, including initial meetings, testing, and documentation.

49. We acknowledge that a case could arise in which a CMRS licensee simultaneously receives a multitude of interference notices, such that the volume prevents a timely response to all such notices. Although we do not foresee that the circumstance would arise often, relief could be made available through the waiver process. We would expect waiver requests to meet the Commission's waiver standard, contain detailed factual support and a projected time when the carrier can respond to, analyze, and abate the objectionable interference.[109] While the waiver request is pending, however, the relevant CMRS licensee(s) must take all reasonable steps to respond to interference incidents as quickly as possible. We delegate to the Wireless Telecommunications Bureau, the authority to act on such waiver requests. We reiterate, however, that if a cell site (or cell sites) is implicated in a dramatic spike in interference incidents that threaten the safety of life, health, and property, we may require these cell site operator(s) to cease operations until the interference problem is resolved.[110]

50. In the *800 MHz R&O* we stated that all parties involved in an interference incident, including public safety and CII licensees, are under an affirmative duty to act in good faith in resolving an interference dispute.[111] These good faith requirements include, without limitation, the obligation to

[107] *See 800 MHz R&O*, 19 FCC Rcd 15045 ¶ 143.

[108] *See* 47 C.F.R. §§ 22.972(a)(2), 90.674(a)(2).

[109] *See* 47 C.F.R. § 1.925 (setting forth waiver standard).

[110] *800 MHz R&O,* 19 FCC Rcd 15044-45 ¶ 140

[111] *Id.* at 15043 ¶ 138.

timely meet appointments and provide whatever technical assistance is appropriate under the circumstances. We will neither hesitate to act when the obligation of good faith is breached nor sanction any disingenuous allegations that the good faith obligation has been breached.

G. Band Reconfiguration Mandatory Schedule

1. Eighteen-Month Benchmark (Former General Category Channels 1-120)

51. In the *800 MHz R&O*, we adopted an interim benchmark whereby, within eighteen months of release of a *Public Notice* announcing the start date of band reconfiguration in the first NPSPAC region, Nextel must complete, and the Transition Administrator must certify that Nextel has completed, the retuning of former Channels 1-120 (within the current General Category channels) in twenty NPSPAC Regions.[112]

52. We imposed this benchmark because the band plan appeared to represent that the General Category channels would first be cleared of all incumbents and that the NPSPAC licensees would immediately be relocated into the 806-809 MHz/ 851-854 MHz segment of the General Category. We now realize that the parties intended only relocating incumbents—other than Nextel and SouthernLINC—from former Channels 1-120.[113] Thus, Nextel and SouthernLINC would meet a portion of their subscriber demand by retaining their Channel 1-120 facilities while the band is being reconfigured. Only as a last step in the process would former Channels 1-120 become available for use by the NPSPAC licensees and their facilities retuned to these channels.

53. In light of the foregoing, we agree it would be impractical for Nextel to meet the eighteen-month benchmark established in the *800 MHz R&O*.[114] Nonetheless, we remain convinced that the public's interest in timely completion of band reconfiguration demands that a meaningful midpoint benchmark be maintained. Accordingly, and with the benefit of a better understanding of the proposed band reconfiguration process, we are requiring Nextel to meet a two-fold benchmark eighteen months after band reconfiguration has commenced. By that time it must have:

- Relocated all but Nextel and SouthernLINC incumbents from Channels 1-120 in the first twenty NPSPAC Regions the Transition Administrator has scheduled for band reconfiguration; and,

- Initiated retuning negotiations with all NPSPAC licensees in said Regions. "Initiated" as the term is used here means, at a minimum, contacting the NPSPAC licensee in writing, and with at least one oral two-way communication, setting out the proposed schedule of relocation, with proposed dates for each element thereof, and requesting from the NPSPAC licensee, within a date certain, a written, itemized estimate of the cost of reconfiguring its system(s). Evidence that the retuning negotiations have commenced shall be in the form of a written communication from the NPSPAC licensee.

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[112] *Id.* at 15130 ¶ 346. We may consider and exercise any appropriate enforcement action within our authority, including assessment of monetary forfeitures or, if warranted, license revocation if Nextel failed to meet this interim benchmark, for reasons that Nextel, with the exercise of due diligence, could reasonably have avoided. *Id.*

[113] *See Sep. 16 Ex Parte* at 2.

[114] *See id.*